

September 12, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Appellant: Burkhalter, Rayson & Associates

Date of Filing: July 25, 2003

Case Number: TFA-0037

On July 25, 2003, Burkhalter, Rayson & Associates (the Appellant) filed an Appeal from a final determination issued by the Department of Energy's (DOE) Oak Ridge Operations Office (OR). In that determination, OR responded to a Request for Information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b), as implemented by the DOE in 10 C.F.R. Part 1004. OR released portions of a responsive document. The Appeal claims that an additional portion of this document exists but was not located by OR. This Appeal, if granted, would require OR to locate and release that portion of the document to the Appellant.

I. BACKGROUND

On April 27, 2002, the Appellant filed a request for information with OR seeking a number of documents. On November 22, 2002, OR issued a determination letter (the Determination Letter) releasing a number of responsive documents to the Appellant and withholding one document, "the proposal submitted by UT-Battelle, LLC, . . . that resulted in UT-Battelle, LLC, receiving the contract for [managing and operating the Oak Ridge National Laboratory]" (the Proposal) in its entirety under FOIA Exemption 3. Determination Letter at 1. On December 17, 2002, the Appellant filed an appeal of that Determination challenging OR's withholding determination under Exemption 3. On February 13, 2003, we issued a decision and order granting the Appeal in part and remanding the matter to OR. *Burkhalter, Rayson & Associates, Case Number TFA-0008*, 28,006 DOE ¶ 80,271 (February 13, 2003) (*Burkhalter I*). In *Burkhalter I*, we stated

In its determination, OR relied upon the National Defense Authorization Act for Fiscal Year 1997 [the NDAA]. Public Law 104-201, Section 821. Section 821 prohibits the release of a proposal submitted in response to a competitive solicitation. *Id.* However, this requirement "does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the [DOE] and the contractor that submitted the proposal." 10 U.S.C.A. § 2305. The Appellant correctly notes that the Proposal was in fact incorporated by reference into the contract between DOE and UT-Battelle. Contract No. DE-AC05-00OR22725 at Section H-15, Page 11 of 27 and Section I-71, Page 91 of 236. Accordingly, we find that **the Proposal** is not exempted from mandatory disclosure under the FOIA by the National Defense Authorization Act for Fiscal Year 1997.

Burkhalter I at 2 (emphasis supplied). Accordingly, we remanded the matter to OR with instructions to “promptly release the Proposal to the Appellant or to provide a thorough explanation of any other justification for withholding the Proposal (or portions thereof).” *Id.*

On July 3, 2003, OR issued a new determination letter (the July 3, 2003 Determination Letter). The July 3, 2003 Determination Letter stated:

We have completed our review of the subject Award Proposal set forth or incorporated into the subject contract by reference. Enclosed in their entirety are copies of Volume II Technical and Business Management Proposal Part A - Technical Summary and Presentation Visuals and Part B - Past Performance, Resumes and Organization Chart.

Volume I of the subject Award Proposal is enclosed with deletions of social security number[s] of individuals listed in Volume I, Section K- Representations, Certifications and Other Statements of Offeror in accordance with 5 U.S.C. § 552(b)(6).

July 3, 2003 Determination Letter at 1. The present Appeal was filed on July 25, 2003. The Appeal contends

On or about July 5, 2003, we received, by letter dated July 3, 2003, what purports to be the Proposal. (A copy of the letter and “Proposal” is attached as Exhibit III). However, the “proposal” received is incomplete. Attached in a excerpt from the Final Report to the Office of Science, dated March 31, 2001, which indicates on page 46 that the proposal was a “five-volume proposal.” (See attached Exhibit IV). We received only two (2) volumes of the proposal.

Appeal at 1. (Emphasis in the original).

II. ANALYSIS

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., *Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. “[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord *Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, “[t]he issue is not whether any further documents might conceivably exist but rather whether the government’s search for responsive documents was adequate.” *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original).

OR indicates that only four volumes exist: Volume I, Volume IIA, Volume IIB and Volume III. July 31, 2003 Email from Amy Rothrock, OR FOIA Officer, to Steven Fine, OHA Staff Attorney. The

Appellant cites a publication by an outside source, the Research Value Mapping Program (RVMP), in support of its contention that the Proposal consisted of five volumes. However, an assertion by an outside entity, such as the RVMP, does not establish that a particular document exists in the Government's files.

The July 3, 2003 Determination Letter only identifies three of the four responsive volumes, specifically Volumes I, IIA and IIB. The Determination Letter further indicates that OR released Volumes IIA and IIB in their entirety and a redacted version of Volume I. The only information that the Determination Letter indicates is being withheld is social security numbers which it redacted from Volume I under Exemption 6. The July 3, 2003 Determination Letter fails to identify Volume III as a responsive document, even though it was part of the Proposal which, in *Burkhalter I*, we ordered OR to either release or withhold under a different exemption. When we contacted OR about this discrepancy, OR indicated it had determined that part of the Proposal was not incorporated into the contract and could therefore still be withheld under Exemption 3. July 31, 2003 Email from Amy Rothrock, OR FOIA Officer, to Steven Fine, OHA Staff Attorney. In other words, OR continued to withhold a portion of the Proposal (Volume III) under Exemption 3, even though we had previously found (in *Burkhalter I*) that the entire Proposal could not be withheld under Exemption 3. If OR was convinced that our holding in *Burkhalter I* was too broad, it should have filed a Motion for Reconsideration with this office instead of effectively withholding Volume III by improperly failing to identify it as responsive.

Moreover, OR issued a Determination Letter which made no mention of the fact that it was continuing to withhold a portion of the Proposal under Exemption 3. OR attempts to justify this omission by contending (1) "the intent of the NDAA (b)(3) exemption was to reduce the agency burden of reviewing portions of entire proposals line by line if they were not incorporated by reference into the follow on contract," and (2) "because the proposal was subject to our earlier determination to withhold it in its entirety under (b)(3) NDAA, I did not think that the language for withholding of the remaining portions of the proposal (Volume III) under (b)(3) after completing this second review required repeating in the second determination letter." July 31, 2003 Email from Amy Rothrock, OR FOIA Officer, to Steven Fine, OHA Staff Attorney.

These contentions are without merit. It is well settled that if the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to (1) specifically identify the information it is withholding, (2) specifically identify the exemption under which it is withholding the information, and (3) provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6); 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). These requirements allow both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and facilitates this Office's reviewing of that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992). While the NDAA prevents disclosure of information contained in certain bids submitted to the Government (unless that information is incorporated by reference in the contract), the NDAA does not relieve agencies from these statutory and regulatory obligations.

By failing to (1) fully comply with our holding in *Burkhalter I* and (2) provide any justification of its continued withholding of Volume III, OR has deprived the Appellant of an opportunity for meaningful review of OR's response to its FOIA request. Moreover, we are concerned that OR might be depriving the Appellant access to information granted to it by the FOIA. Accordingly, we are remanding this matter to OR. On remand, OR must promptly issue a new determination letter. The new determination letter must provide a meaningful description of the contents of Volume III and then must either release it to the Appellant or withhold it (or portions thereof) under an appropriately justified FOIA exemption.

It Is Therefore Ordered That:

- (1) The Appeal filed by Burkhalter, Rayson & Associates, Case No. TFA-0037, is hereby granted in part as set forth in Paragraph (2) and denied in all other aspects.
- (2) The Appeal is hereby remanded to the Oak Ridge Operations Office for further proceedings in accordance with the instructions set forth above.
- (3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 12, 2003